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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-225

E. E. FALK, ET AL., PETITIONERS

v.

JAMES D. HODGSON, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1-16) is reported at 439 F.2d 340. The opinion of the district court (Pet. App. B, pp. 17-28) is reported at 312 F.Supp. 608.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1971. The petition for a writ of certio-

rari was filed on June 1, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' firm, which, as part of its general real estate brokerage and management business, operates and manages apartment house projects owned by various clients, performs "related activities * * * for a common business purpose" so as to constitute an "enterprise" within the meaning of Section 3(r) of the Fair Labor Standards Act.

2. Whether, for purposes of the Act's "enterprise" coverage provisions, the "annual gross volume of sales made or business done" by petitioners' building management activities should be determined by the total rentals received from the buildings which petitioners operate and manage, or by the commissions deducted from such gross receipts to pay petitioners' fees.

3. Whether petitioners' firm is an "employer", within the meaning of the Act, of the building maintenance workers whom it hires, fires, and supervises.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*, are set forth in Appendix C of the petition, pp. 29-31.

STATEMENT

This suit was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act,

29 U.S.C. 217, to restrain petitioners from violating the Act's minimum wage (Section 6(b)), overtime (Section 7(a)(2)) and recordkeeping (Section 11(c)) provisions, and from continuing to withhold unpaid wages due to certain building maintenance employees. Petitioners stipulated the amounts that would be due under the Act's minimum wage and overtime provisions (A. 38, 44),[1] but denied that they were an "employer" of the maintenance workers or that they were an "enterprise" subject to the Act's requirements. The district court sustained these contentions and dismissed the complaint (Pet. App. B, pp. 17-28). The court of appeals reversed (Pet. App. A, pp. 1-16).

1. Petitioners, partners in the firm of Drucker & Falk, are engaged in various real estate brokerage and management activities, including the operation and management of some 30 apartment buildings located in various cities in Virginia (A. 16-19, 29, 85). These management activities are carried out under contracts with the building owners, which delegate to petitioners all of the functions required for leasing, maintaining, and operating the apartment buildings. Petitioners advertise the availability of apartments for rent;[2] sign, renew, and cancel leases; col-

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[1] "A." references are to the appendix filed with the court of appeals.

[2] A "typical" advertisement consists of a map showing the location of several projects, and containing the caption, "THAT'S US ALL OVER" and the name "DRUCKER & FALK" in large capital letters (A. 38, 75-76). Prospective

lect rents; institute, prosecute and settle all legal proceedings for eviction, possession of the premises, and unpaid rent; make repairs and alterations; negotiate contracts for electricity, gas, fuel, water, telephone service, window cleaning, rubbish removal, repair work, and other services; purchase supplies; pay all bills, including mortgage payments, etc.; prepare an operating budget for the owner's review and approval, and submit periodic reports to the owner; and hire, discharge and supervise all labor and employees required for the operation and maintenance of the premises (A. 77-80, 86-87, 97-100, 105-108). The participation of the building owners, some of whom reside outside the State, is limited to their review and approval of the budgets prepared by petitioners and periodic visits to their buildings (A. 90-91).

Petitioners conduct these building management activities from their main office in Newport News, under the direction and control of their "management department." This department is staffed by an Executive Director, who has overall responsibility for the operation and management of the 30 apartment buildings, an Assistant Executive Director, and six area managers, who are each responsible for one or more of the buildings (A. 31, 88). These individuals are admittedly employees of the petitioners (A. 35). Other admitted employees are the rental

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tenants are directed either to the partnership's main offices in Newport News, or to "Drucker & Falk" at the apartment location (A. 76).

agents and clerical personnel hired to operate the rental offices, collect and deposit rents, take tenant complaints, maintain office records, and transmit receipts and other information to petitioners' central office (A. 88-89).[3]

In addition to these employees, petitioners assign a maintenance superintendent or project manager to each building or building complex. These superintendents are hired by petitioners and work under the direct control of the six area managers in petitioners' central office (A. 38, 89). Subject to petitioners' approval, the superintendents hire, fire, and supervise the maintenance employees necessary for the operation of the project to which they are assigned (A. 87, 91). More than 100 superintendents and maintenance workers are required to operate the 30 buildings managed by petitioners, and it is their wages which are the subject of this action (A. 31-35, 45-74). Although these workers are labelled by the contracts as "employees of the project owner[s]" (A. 85, 87, 99-100, 108), they are hired by petitioners, either directly or indirectly, and they "look to the [petitioners] for supervision and direction" (A. 92). It is petitioners who establish their hours and wages, acting within the limits of the budgets they prepare for each owner (A. 87); petitioners also arrange for transfers and promotions (A. 92).

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[3] Although there were some instances in which these employees were carried on the payroll of the building owner, they were nonetheless supervised and paid by the partnership (A. 85, 87-88, 96, 105). In any event, none of these employees received wage payments which would be substandard under the Act.

Petitioners, under the name of Drucker & Falk as agent, pay all the expenses incurred in operating and maintaining the apartment projects, including the wages of the building service employees, from rent receipts deposited into local customer accounts (A. 86, 88-89). Rents from the several buildings managed by petitioners totalled $7,725,600.86 in 1967, and $8,607,086.04 in 1968 (A. 20). Payments are transmitted to the building owners on a periodic basis, after petitioners have deducted their commissions—which totalled $434,228.15 in 1967, and $462,757.50 in 1968—and paid the other expenses (A. 21). If disbursements are in excess of gross receipts, the owners are required to reimburse petitioners (A. 86).

2. The district court upheld petitioners' contention that their building management activities did not qualify as a covered "enterprise" within the meaning of the Act, stating that it was "not convinced" that the activities performed by petitioners at each of the separately owned buildings were "related activities performed * * * for a common business purpose" within the meaning of Section 3(r). Furthermore, the court held that these activities did not meet the $500,000 dollar-volume test prescribed by Section 3(s)(1), on the ground that petitioners' "annual dollar volume of sales made or business done" must be measured by their commissions, and not by gross rents received from the several buildings (Pet. App. B, pp. 18-28). The district court also agreed with petitioners that the building superintendents and other maintenance workers were "employees of the

project and not employees of the defendants [petitioners]" (Pet. App. B, pp. 27-28).

The court of appeals reversed on each of these issues (Pet. App. A). On the question whether petitioners' building management activities constitute an enterprise within the meaning of Section 3(r), the court concluded that petitioners "maintain under 'common control' or as a 'unified operation' a set of 'related activities' having a 'common business purpose'" (Pet. App. A, pp. 10-11). As to the dollar-volume test, the court, relying on decisions of the Fifth and Tenth Circuits and of another district court, concluded that "the term 'annual gross volume of sales' means 'gross receipts' from all sales, whether made by one as agent for another or by one for his own account" (Pet. App. A, pp. 12-15). Finally, on the employment issue, the court, referring to petitioners' supervisory powers, concluded that petitioners "act 'directly or indirectly in the interest of an employer in relation to an employee' and that the maintenance workers are 'employees' of, and 'employ[ed]' by defendants [petitioners] within the statutory definitions of the Act" (Pet. App. A, pp. 7-9).

ARGUMENT

We contend that the decision below, in all respects, correctly applies the provisions of the Fair Labor Standards Act and should be affirmed in the event of review by this Court. Since there is no conflict among the circuits on questions 2 and 3, further review of these two questions is unnecessary. However,

on question 1 (concerning application of the Act's "enterprise" coverage based on "related activities") a conflict has developed with the recent decision of the Court of Appeals for the Third Circuit in *Hodgson* v. *Arnheim and Neely, Inc.*, Nos. 18,772, 18,773, 18,774, decided June 15, 1971, which reversed the district court decision in *Shultz* v. *Arnheim and Neely, Inc.*, 324 F.Supp. 987 (W. D. Pa.), referred to in the petition (p. 6, n. 2).[4]

The divergent rulings of the court below and of the Third Circuit on question 1 relate to the proper construction of Section 3(r) of the Act's "enterprise" coverage provisions. The importance of this issue goes far beyond its applicability to the real estate industry; indeed, the Third Circuit's holding brings into question the basic interpretation of the "enterprise" coverage provisions which the Department of Labor has followed consistently since the Act's coverage was extended to "enterprise[s]" in 1961. Accordingly, unless the Third Circuit grants the Secretary's petition for *en banc* review, filed on August 16, 1971, and reverses the panel decision in *Arnheim and Neely*, we do not oppose the granting of a writ of certiorari limited to question 1.

1. Under Section 3(r), an "enterprise"

> means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities

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[4] The court of appeals' opinion in *Arnheim & Neely* is reproduced as an Appendix, *infra*.

> whether performed in one or more establishments or by one or more corporate or other organizational units * * *.

Petitioners' activities clearly meet these statutory requirements. First, as the court of appeals noted, the building management activities performed by petitioners "are substantially similar from project to project" (Pet. App. A, p. 10; see also S. Rep. No. 145, 87th Cong., 1st Sess., p. 41 (1961)), and are thus "related" within the meaning of Section 3(r). Moreover, since petitioners supervise their building management activities "through a hierarchy terminating in their central offices" (Pet. App. A, p. 10), these activities are performed through "unified operation or common control." Finally, as the court below recognized, these activities have "a common business purpose," since all are performed in furtherance of petitioners' managerial services. And even though petitioners act formally as agents for the building owners, their building management activities are part of their own separate business operation in which they are engaged as independent entrepreneurs.

Petitioners contend that because the building owners who have engaged their management services have no relationship to each other, petitioners' activities are not performed "through unified operation or common control" for petitioners' "common business purpose." This was also the basis for the Third Circuit's ruling in *Hodgson* v. *Arnheim and Neely, supra.* As did the Third Circuit, petitioners have focused on

the lack of a relationship between their clients and not, as required by Section 3(r), on the relationship of petitioners' own activities.

Section 3(r) contains no requirement that "enterprise" activities must be performed in establishments which are themselves related. Indeed, it is no more necessary for the several buildings where petitioners perform their management activities to be related, in order for the activities to qualify as an enterprise, than it is for the several buildings or job sites at which employees of a construction firm work. See, *e.g.*, *Clifton D. Mayhew, Inc.* v. *Wirtz*, 413 F.2d 658 (C.A. 4); *Childress* v. *Earl Whitley Enterprises, Inc.*, 388 F.2d 742 (C.A. 4). Petitioners' argument, if carried to its logical conclusion, would mean that sales to the customers of a retail store (or chain of stores) are not "related" unless the customers are tied together by a "common business purpose." Nothing in the statutory language or legislative history of Section 3(r) supports such a construction. On the contrary, Congress clearly intended to "provide minimum wage and overtime protection under the act for approximately 100,000 additional employees in such enterprises as wholesale trade, finance, insurance, real estate, transportation, communications, and public utilities, and business, accounting, and similar services" (S. Rep. No. 145, 87th Cong., 1st Sess., p. 31; H. Rep. No. 75, 87th Cong., 1st Sess., p. 13). This purpose could not be accomplished under petitioners' construction, since few service businesses which operate on the premises of others would ever

derive sufficient sales from a single customer to meet the dollar-volume test of Section 3(s)(1).[5]

Petitioners' reliance on *Wirtz* v. *Hardin & Company*, 253 F. Supp. 579 (N. D. Ala.), affirmed *per curiam*, 359 F.2d 792 (C.A. 5), is misplaced, since there the related activities were performed by several separate corporations and not, as in the instant case, by a single legal entity. As a result, it was necessary in the *Hardin* case to tie together several separately incorporated retail stores in order to establish enterprise coverage. In concluding that these corporations were not related for purposes of the Act, the district court relied on evidence that the stores were independently operated by local managers who made their own decisions and had "full authority and responsibility" over their employees (253 F. Supp. at 584-585). Moreover, Congress has expressed its disapproval of the narrow construction given in *Hardin* to Section 3(r). See S. Rep. No. 1487, 89th Cong., 2d Sess., p. 7. See also *Wirtz* v. *Barnes Grocer Company*, 398 F.2d 713, 721-722 (C.A. 8).

Contrary to petitioners' view of this case, the government has not sought to "bring the independent apartment owner[s] within the Act" (Pet. 6). None of them has been named as a party to this action, and the mere fact that some of petitioners' employees perform their activities on the premises of a building owner does not make that owner a covered employer

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[5] This would have been especially true when the 1961 amendments were passed, for the original dollar-volume provision (Section 3(s)(3)) set a minimum of $1,000,000.

except, of course, to the extent that he may be a joint employer of petitioners' employees (in which event his liability would be limited to jointly employed workers).

Petitioners contend that the Fourth Circuit's holding with respect to enterprise coverage contradicts this Court's statement in *Maryland* v. *Wirtz*, 392 U.S. 183, 188, that the "effect of the 1961 change was to extend protection to the fellow employees of any employee who would have been protected by the original Act, but not enlarge the class of *employers* subject to the Act" (Pet. 7). To the extent, however, that petitioners have employees traditionally covered by the Act (and they do, since they have employees who are regularly engaged in interstate telephone and mail communications (A. 28, 37)), petitioners are employers subject to the original Act. In any event, the legislative history of the Fair Labor Standards Amendments of 1961 and of 1966 shows that Congress intended to extend coverage to employers whose only connection with interstate commerce is that some of their employees "handle or otherwise work on goods that have been moved in or produced for commerce," even though these employers would not have been covered under the original Act. As the Second Circuit pointed out in *Wirtz* v. *Melos Construction Corp.*, 408 F.2d 626, where it based coverage on such "handling" activities, "[a] careful reading of the [*Maryland*] opinion shows * * * that this language is directed only at the portion of the [1961] amendment which brings about this particular extension of coverage. It is not directed to the

impact of the words concerning employees [handling or] working with goods that 'have been moved in * * * commerce * * *'" (*id.* at 628, n. 5).

2. There is no disagreement among the circuits on the "annual gross volume of sales" issue. All the courts of appeals which have considered this issue have held, as did the court below, that the term "annual gross volume of sales" means "gross receipts" from *all* sales, whether made in an agency capacity or for one's own account. *Hodgson* v. *Arnheim and Neely, Inc., supra; Wirtz* v. *First National Bank and Trust Company*, 365 F.2d 641, 643, 645 (C.A. 10); *Wirtz* v. *Jernigan*, 405 F.2d 155, 158-159 (C.A. 5).[6] Any other construction would be contrary to the Act's broad definition of "sales" and would frustrate the congressional intent that the dollar-volume test realistically measure the size of the enterprise and its impact on commerce (S. Rep. No. 1487, 89th Cong., 2d Sess., pp. 7-8; see also *First National Bank, supra*, 365 F.2d at 645; *Wirtz* v. *Allen Green & Associates, Inc.*, 379 F.2d 198, 199-200 (C.A. 6)).

Petitioners, like the management firms in *Arnheim and Neely* and *First National Bank*, and like the bus

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[6] Although the *Jernigan* case involved the retail establishment exemption of Section 13(a)(2), rather than the "enterprise * * * coverage" of Section 3(s), the application of both provisions depends upon the same definition of "sale" provided in Section 3(k) of the Act, and the Senate Report clearly states that gross sales should be measured in the same way for both provisions (S. Rep. No. 145, 87th Cong., 1st Sess., p. 38 (1961)).

agency in *Jernigan*, perform all the activities necessary to sell[7] or "[market] the property under [their] control" (*Wirtz* v. *First National Bank*, *supra*, 365 F.2d at 645). The fact that the property is owned by others does not reduce the magnitude of petitioners' marketing activities, nor does it diminish their impact on commerce. They, and not the building owners, purchase the supplies needed for the operation and maintenance of the 30 apartment buildings, including fuel, paint, plumbing and heating supplies, carpentry materials, etc.—substantial quantities of which originate from outside the state (A. 37, 87); negotiate contracts for water, gas, and electricity; and hire, supervise and pay more than one hundred maintenance, rental and clerical workers. Plainly, these activities will have the same "effect on the flow of men, money, and materials across state lines" (*Allen Green & Associates, Inc.*, *supra*, 379 F.2d at 200) as they would have if petitioners owned the buildings.

3. That the relationship of employer-employee exists between petitioners and the building maintenance workers, as the court below held, is settled by a long line of decisions by this and other courts (see, *e.g.*, *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722; *United States* v. *Rosenwasser*, 323 U.S. 360, 362; *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28), including a number which have held on facts virtually identical to those presented here that

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[7] In *Kirschbaum* v. *Walling*, 316 U.S. 517, 526, this Court recognized that leasing of property constitutes the "sale" of space.

building maintenance companies are "employers" of the maintenance employees they engage to work in the buildings they manage. See *Hodgson* v. *Arnheim and Neely, Inc., supra; Greenberg* v. *Arsenal Bldg. Corporation*, 144 F.2d 292, 294 (C.A. 2), reversed in part on other grounds *sub nom. Brooklyn Bank* v. *O'Neil*, 324 U.S. 697; *Herbert Harvey, Inc.* v. *National Labor Relations Board*, 385 F.2d 684, 685-686 (C.A. D.C.); *Herbert Harvey, Inc.* v. *National Labor Relations Board*, 424 F.2d 770, 774 (C.A. D.C.).

Petitioners concede that all the common law tests for determining the master-servant relationship are met here, but they contend that the "economic reality" is otherwise. Petitioners' reliance on the "economic reality" test (Pet. 7) is misplaced. That test does not impose stricter standards than the common law control test, as petitioners apparently believe. On the contrary, it was fashioned and developed by this Court for the social legislation of the 1930's, including the Fair Labor Standards Act, which defined the employment relationship in much "broader or more comprehensive" terms than at common law (*Rosenwasser, supra*, 323 U.S. at 362). As the Court explained in *Rutherford, supra*, the "economic reality" test is designed to bring within, rather than exclude from, such legislation "persons and working relationships which, prior to this Act, were not deemed to fall within the employer-employee category" (331 U.S. at 729). Here, the employer-employee relationship exists under common law tests; there is, accord-

ingly, no need to resort to the "economic reality" test.

CONCLUSION

There is no reason for further review of the court of appeals' holdings on the "annual gross volume of sales" and the employment issues (questions 2 and 3). We suggest, however, that the Court's consideration of the petition await disposition by the Court of Appeals for the Third Circuit of the Secretary's petition for rehearing in *Arnheim and Neely, supra.* If the conflict between the Third and Fourth Circuits concerning the proper construction of Section 3(r) —which is basic to the Act's "enterprise" coverage provisions—then persists, we would not oppose the granting of the petition for certiorari limited to question 1. If the conflict is eliminated upon further consideration by the Third Circuit, certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

BESSIE MARGOLIN,
Associate Solicitor of Labor,

CARIN ANN CLAUSS,
Attorney,
Department of Labor.

SEPTEMBER 1971.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18,772, 18,773, 18,774

JAMES D. HODGSON, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
APPELLANT IN NO. 18,772

v.

ARNHEIM AND NEELY, INC., a Corporation,
APPELLANT IN NO. 18,773

and

THE INSTITUTE OF REAL ESTATE MANAGEMENT
OF THE NATIONAL ASSOCIATION OF
REAL ESTATE BOARDS, INTERVENOR,
APPELLANT IN NO. 18,774

(D. C. Civil Action No. 67-1202)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued March 17, 1971
Before ADAMS and GIBBONS, *Circuit Judges*, and
WHIPPLE,* *District Judge*

OPINION OF THE COURT

(Filed June 15, 1971)

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* Of the New Jersey District Court sitting by designation.

ADAMS, *Circuit Judge.*

In this case, we are asked to decide whether a real estate management company which operates and maintains, but does not own, certain commercial buildings is an employer whose activities are regulated by the Fair Labor Standards Act as amended.

The Secretary of Labor sought an injunction in the District Court for the Western District of Pennsylvania under § 17 of the Fair Labor Standards Act, 29 U.S.C.A. § 201, *et seq.*, to enjoin Arnheim and Neely, Inc. (Company) for violating the minimum wage, overtime, and record keeping provisions of the Act, and to require the Company to pay back wages owed to the employees.

The District Court decided that from January, 1964 until February, 1967 the Company had not been subject to the Act's requirements, but thereafter, as a result of the 1966 amendments to the Act, the Company came within the enlarged scope of the Act, because the 1966 amendments reduced the economic criteria for coverage. Accordingly, the District Court granted the relief sought by the Secretary of Labor for the years following 1967 only. The Government appealed, and the Company filed a cross appeal.

The facts have been stipulated. The Company manages eight office buildings and one apartment complex located in the greater Pittsburgh area. The Company does not own these buildings except for a minor interest in one of them, but operates them under a management contract. Pursuant to the contract, the Company obtains tenants, negotiates and signs leases, institutes legal actions regarding these leases when necessary, alters and redecorates the buildings according to its own judgment, obtains utility contracts, and pays taxes and other bills relating to the proper-

ties. The Company collects the rent receipts for each building and deposits them in a separate bank account established for each building. The funds deposited in these accounts are the property of each building's owner, and expenses for each building are paid from the bank account established for that building. Any loss suffered in regard to a particular building is the loss of the owner of such building and not of the Company. Likewise, the profits belong to the respective owners of the buildings and not to the Company. Periodically, the Company withdraws the balance of funds having accrued in each account and forwards them to the respective owners.

The Company hires, discharges and supervises all employees necessary for the operation and maintenance of the buildings. Such employees include building superintendents and their assistants, cleaning ladies, custodians, watchmen, and elevator operators. Subject to the approval of the building's owner, the Company assigns each worker to his particular duties, fixes hours of work, and negotiates rates of pay and fringe benefits. In each building at least two employees operate elevators which carry postmen and messengers who deliver mail and packages to the building's tenants; a portion of such mail and packages originate from points outside of Pennsylvania. In one of the buildings, the Buhl Building, two employees personally deliver to tenants parcels, some of which originate outside of Pennsylvania. At another building, 319 Fifth Avenue, the elevator operators transport freight from the tenants, a portion to be delivered to points outside of Pennsylvania.

"Staff managers" employed by the Company maintain records relating to these buildings and submit periodic reports to the owners of each building. Some of the owners are located in states other than Penn-

sylvania. In 1964, the aggregate gross receipts from the nine buildings was approximately two million dollars, and from 1956 until the present the gross receipts have exceeded one million dollars per year.[1] The Company's commission has varied from year to year, but at no time has exceeded five hundred thousand dollars in any one year.

The Fair Labor Standards Act requires employers covered by the Act to pay their employees a fixed minimum wage,[2] forbids employers to require their employees to work more than a forty hour week unless they receive one and one half times their regular wages for such work, and mandates that records of wages and hours be maintained by the employers.

In reaching its ultimate conclusions regarding the scope of the Act's coverage before and after the 1966 amendments, the District Court made several subsid-

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[1] The gross receipts of each building during 1964 are stipulated:

Buhl Building	$ 93,537.62
Clark Building	800,902.10
Eureka Savings Building	71,873.24
Keenan Building	176,653.72
Martin Building	117,948.45
Pittsburgh Terminal Properties	285,225.57
University Square No. 1	277,848.02
Pittsburgh Life Building	54,307.00
Building 319 Fifth Avenue	57,190.00
	$1,935,485.72

[2] The basic minimum wage set by the Act has been increased by Congress several times during the periods relevant to this case:

From 1/4/64 until 1/31/67	$1.25
From 2/1/67 until 1/31/68	$1.40
From 2/1/68 until the present	$1.60

iary legal determinations. Each has been attacked, either by the Secretary or the Company.

I

The District Court decided that the Company, notwithstanding the fact that it was acting as an *agent* in hiring employees to maintain the buildings, was an "employer" as defined by the Act. In so deciding the District Court rejected the Company's contention that the term "employer" was to be given its common law or its traditional meaning. Instead, the Court applied the standard contained within the Act itself. The Act provides "that the term 'employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . ." 29 U.S.C.A. § 203(d). On its face the statute adopts a definition of the term "employer" broader than that of the common law, and applicable under the present facts to the Company. Thus, in Greenberg v. Arsenal Bldg. Corp., 50 F. Supp. 700 (S.D.N.Y. 1943), aff'd 144 F.2d 292 (2nd Cir. 1944), rev'd on other grounds *sub nom* Brooklyn Bank v. O'Neil, 324 U.S. 697 (1945), it was held that a real estate management company is an employer for purposes of the Act despite the agency relationship of the management company to owners of the managed buildings.

The fact that the owners of the buildings may also be considered "employers" as a result of their ultimate right to review policies and hiring practices followed by the Company does not preclude a finding that the Company is also an "employer." The Act contemplates the possibility of several simultaneous "employers" any one of which may be liable as an employer under the Act. Wirtz v. Herbert, 368 F.2d 139 (5th Cir. 1966): Mid-Continent Pipe Line Co. v. Hargrave, 129 F.2d 655 (10th Cir. 1942).

The Company argues that Bartels v. Birmingham, 332 U.S. 126 (1947), provides the applicable test—one of economic reality—to determine whether it is an "employer." As support for this contention, the Company stresses certain language of the *Bartels* opinion: "Obviously control is characteristically associated with the employer-employee relationship, but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service." 332 U.S. at 130. The District Court read this language in conjunction with United States v. Silk, 331 U.S. 704 (1947), decided a week before *Bartels*, which held that in social legislation the term "employer" was not to be given a restrictive common law construction. 331 U.S. at 712. Thus the Courts are required to avoid technical concepts of the employment relationship and are admonished to examine the economic realities presented by the facts of each case. Goldberg v. Whitaker House Coop., 366 U.S. 28, 33 (1961). Applying the "economic reality" test to the present facts, there can be no doubt of the appropriateness of treating the Company as an employer. The Company's business is that of maintaining and managing real property for the individual owners of such property. Such activity provides economic benefit to the Company's clients as well as to the Company itself. Unsatisfactory work will harm both the Company and the building owners. Since the Company hires these employees and provides the conditions of their employment, it appears that the Company is "acting directly or indirectly in the interest of an employer in relation to an employee." The District Court correctly decided that the Company was an "employer" of the various persons working at the buildings, as such term is defined by the Act.

II

A second test imposed by the Act concerns the "amount of gross volume of sales of [the] enterprise." 29 U.S.C.A. § 203(s)(3) before the 1966 Amendments; 29 U.S.C.A. § 203(s)(1) after the 1966 Amendments. The District Court, over the objections of the Company, decided that the economic test contained in the Act applied to the gross rental receipts of the buildings and not to the gross commissions earned by the Company. We agree with the District Court. The statute clearly refers to the gross sales of an "enterprise," [3] which term is defined as "related activities performed . . . by any person or persons for a common business purpose. . . ." § 203(s). Thus, in Wirtz v. Jernigan, 405 F.2d 155 (5th Cir. 1968), it was squarely held that in deciding whether the seller of bus tickets came within the Act's coverage, the gross dollar volume of ticket sales, *not* the seller's commission, was the appropriate indicia of coverage. Since rentals are sales within the meaning of the Act, Wirtz v. First National Bank and Trust Company, 365 F.2d 641 (10th Cir. 1966), it logically follows that the gross rentals of buildings managed by the Company, and not merely the Company's commissions are to be considered in applying the Act.

III

Although the Company is an "employer" within the meaning of the Act, and the gross rentals rather

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[3] Before the 1966 Amendments the Act referred to gross sales of any "establishment" of an "enterprise." Thus, prior to the effective dates of the 1966 amendments, it is clear that the gross rentals of each building would have to be considered separately in applying the Act's economic test.

than the gross commissions govern, we think the District Court erred when it aggregated the rental income of all nine buildings in applying one of the Act's criteria for coverage, the economic test. In addition to the "employer" requirement of the Act, before the 1966 amendments section 203(s)(3) set forth an economic test which limits the Act's coverage to certain businesses enjoying an annual gross volume of sales over one million dollars. The 1966 amendments expanded the Act's coverage by lowering the economic requirement to $500,000 during the period February 1, 1967 through January 31, 1969, and thereafter to $250,000. The legislative history of the Act makes it abundantly clear that the purpose of providing coverage to those companies with a minimum amount of gross sales was to avoid economic dislocation. The Senate Report accompanying the 1961 Amendments to the Act specifies:

> "The million dollar test is an economic test. It is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage. It is a way of saying that anyone who is operating a business of that size in commerce can afford to pay his employees the minimum wage under the law. (emphasis added) 1961 U.S. Code Cong. & Admin. News 1620, 1624.

Since the economic criteria of the Act is based upon a legislative judgment that only businesses which have attained a substantial gross volume of sales should be covered because of their presumed economic capacity to pay a prescribed minimum wage, apparently Congress feared that there might be undesirable economic consequences to small or inefficient

businesses if they were brought within the scope of the Act.

The Company here did not benefit, except as to its commission, as a result of the aggregate gross volume of rentals accruing from all nine buildings. Instead it acted solely in an agency capacity on behalf of each of nine separate and distinct businesses. The facts stipulated in this regard are that the rentals collected by the Company are deposited *in separate bank accounts for each owner*, and such funds are the property of the respective owners of the buildings. Any economic loss suffered in connection with a particular building is that of the owner. Similarly any profit enjoyed belongs to the individual building's owner. While as an agent the Company is liable as an "employer" to adhere to the strictures of the Act, nevertheless such vicarious responsibility does not require that the gross rentals of each of the Company's principals be pooled together merely because each principal has employed the Company as an agent.

The District Court reasoned that since the Company "is in the 'business' of managing the buildings' janitorial services, . . . each building becomes one of [the Company's] 'places of business.'" The analysis employed by the court below has been directly adopted by the Fourth Circuit in Shultz v. Falk, No. 14,572 (filed March 3, 1971). However, the Act requires that before separate establishments be deemed part of an enterprise, they first must be found to be "related activities performed . . . for a common business purpose. . . ." The owner of each of these buildings is not engaged in a business purpose common to all the other eight building owners merely because each employed a common agent. The record is devoid of any other evidence tending to demonstrate that the nine individual building owners have a "common

business purpose."[4] Were the buildings managed by their owners, the Government would not attempt to link them together as an enterprise bound together by a "common business purpose." The building owners' employment of the Company as rental agent does not alter this critical fact.

The legislative intent to exclude for purposes of the Act separate businesses which use common service organizations was made manifest in the Senate Report to the Fair Labor Standards Amendments of 1961, which adopted the "enterprise" concept (1961 U.S. Code Cong. & Admin. News 1620, 1660-1661):

> "The bill also contains provisions which should insure that a small local independent business, not in itself large enough to come within the new coverage, will not become subject to the act by being considered a part of a large enterprise with which it has business dealings.
>
> "The definition of 'enterprise' expressly makes it clear that a local retail or service establishment which is under independent ownership shall not be considered to be so operated and controlled as to be other than a separate enterprise because of a franchise, or group purchasing, or group advertising arrangement with other establishments or because the establishment leases premises from a person who also happens to lease permises to other retail or service establishments. For example, a retail establishement will not become part of an enterprise which operates a shopping center merely because it rents its establishment from the shopping center operator."

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[4] In Mitchell v. Hertzke, 234 F.2d 183 (10th Cir. 1956), the Court held that the Secretary of Labor has the burden of proof on this type of issue in this case.

If the record in this case revealed that the retention of the Company were accompanied by a change in the independent business purposes of the owners —for example facts such as the pooling of profits from the various buildings demonstrating a common business purpose—the result might be different. Here, however, the record reveals that the owners share no common purpose except the decision to hire the Company as their rental or management agent. As pointed out in Wirtz v. Hardin & Co., 253 F.S. 579 (N.D. Ala. 1964), aff'd 359 F.2d (5th Cir. 1965), the utilization of a common service does *not* by itself establish a common business purpose shared by the owners of separate businesses. Without more than here presented, we think the "enterprise" requirement of the Act has not been satisfied. It would be anomalous to treat the owners of commercial buildings as proprietors of individual businesses when they manage the buildings themselves and as participating in a "common business purpose" with other building owners merely because they hire a rental agent who manages other buildings.[5] This is particularly so in view of the expressed intent of Congress not to burden small businesses with a minimum wage they may not be able to afford. Therefore, we think the proper approach under the facts of this case is to consider each of the nine buildings separately.

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[5] It might also be considered anomalous that service employees hired by the management company might be paid different wages depending on the gross rentals of the particular building to which they were assigned. However, in view of the "common business response" requirement of the Act, we think the scale tips toward preventing inconsistent treatment of building owners who employ management companies as opposed to owners who manage their own buildings.

We do not reach additional questions posed on this appeal regarding whether the Company is engaged in interstate commerce as required by the Act, because viewing the gross rentals of each building separately it appears that in 1964 none of the buildings produced sufficient gross rentals to satisfy the Act's economic test. Since the stipulations of fact do not indicate the gross rentals of each building after 1964, we are unable to determine whether any one of the buildings alone satisfies the reduced criteria provided by the 1966 Amendments for coverage under the Act.

Accordingly, the order of the District Court will be reversed and the case remanded so that the Government may have the opportunity to introduce evidence regarding each buildings' gross rentals during the relevant years.

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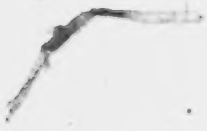

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